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No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

REPLY BRIEF FOR PETITIONER

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REASONS FOR ALLOWING THE WRIT

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The respondent claims that a prosecution under the Sexually Dangerous Persons Act (Article 105 of the Illinois Code of Criminal Procedure) essentially provides an involuntary mental health commitment procedure for recidivist sexual offenders and merely involves an inquiry into mental illness. Brief for Respondent at 3. These assertions are false.

In the first place, sexually dangerous persons are not committed to the Illinois Department of Mental Health; they are committed to Illinois Department of Corrections and are routinely housed with other sex offenders. Ill. Rev. Stat. 1981, ch. 38, §105-9; See Brief for Petitioner at 7.

Secondly, as noted by the Illinois Supreme Court, a sexually dangerous persons prosecution is more than just an inquiry into mental illness. In addition to requiring proof that the defendant suffers from a mental disorder, the prosecution must prove

the existence of criminal propensities to the commission of sex offenses and the existence of demonstrated propensities toward acts of sexual assault. Ill. Rev. Stat. 1981, ch. 38, §105-1.01; See Slip op. at 8. In this case Terry Allen's statements about the charged crime and purported past misconduct were used to prove he was sexually dangerous. His statements as to past crimes were particularly important since he had no prior criminal record of any sex offense. Proceedings under the Act thus resemble criminal prosecutions far more than civil mental commitment actions since the Act does not punish the mere status of mental illness, but instead punishes status plus conduct. Cf. Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968) (chronic alcoholic can be prosecuted criminally for appearing in public while drunk).

Contrary to the claim by respondent, the holding of the Illinois Supreme Court is unique. No other jurisdiction requires that a defendant answer incriminatory questions about charged and purported past sex offenses and then allows the use of any admissions at trial to establish the defendant is sexually dangerous. Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 1064 (1982), which the respondent claims is remarkably similar to this case, actually involves a radically different proceeding. In Massachusetts the sexually dangerous person proceeding is initiated after a criminal trial is held, but before sentencing. Moreover, in Massachusetts the defendant has an evidentiary privilege which provides that incriminatory statements are not admissible on the question of guilt. The instant case, however, involves a proceeding in lieu of criminal prosecution and the defendant's admissions about the charged crimes and prior misconduct are admissible on the question of his guilt, i.e., his status as a sexually dangerous person. This Honorable Court thus should not be misled by the respondent's spurious claim that the holding in this case is the same as that in Massachusetts and

several other jurisdictions. The holding below is, in fact, unique.

Finally, the respondent argues, in an apparent attempt to divert attention from the express holding of the Illinois Supreme Court, that petitioner Allen was not compelled to answer questions and that he waived any constitutional protections. This argument is without merit.

The holding below is that the Fifth Amendment privilege does not even apply to a sexually dangerous persons proceeding. Thus, Illinois defendants charged to be sexually dangerous must answer all questions at compulsory psychiatric examinations and their admissions, including any about the charged crime and past misconduct, may be admitted at trial. Obviously, the court below established a rule of law which will compel all future Illinois defendants charged to be sexually dangerous to answer incriminatory questions. This precedent merits this Court's review.

Moreover, the holding below applies to defendants, who, like Allen, are in custody when he underwent his compulsory psychiatric examinations. The respondent ignores the fact that Allen was in custody. The fact of his custody, of course, is crucial since statements obtained from suspects in custody during a court-ordered psychiatric examination cannot be regarded as freely and voluntarily given unless the defendant is appraised of his rights and has knowingly elected to waive them. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359, 373 (1981). See Minnesota v. Murphy, ___ U.S. ___, 104 S. Ct. 1136, 79 L. Ed. 2d 409, 420-421 (1984).

In this case the Illinois Supreme Court declined to review the State's claim that Allen had waived any privilege since it held the privilege did not apply (Slip op. at 8). Thus, the State's discussion of waiver is irrelevant and unnecessarily diverts attention from the question involved in this case. Mr.

Allen would note, however, that the Appellate Court expressly held that defendant's statements were unwarned and that he did not waive his Fifth Amendment privilege. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135, 137 (3d Dist. 1984).[1]

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[1] In this regard the court stated as follows:

> We find Estelle v. Smith directly applicable to the compulsory psychiatric examinations to which this defendant was subjected and which the trial court must have relied upon to establish all three elements which the statute required be satisfied in order to find the defendant a sexually dangerous person. The record clearly shows that defense counsel objected to the admission of the psychiatrists' testimony on the grounds that the defendant must not be forced to incriminate himself. Dr. Colen never warned the defendant that anything he said might later be used to find him sexually dangerous nor did Dr. Beck give an adequate warning. Therefore, the trial court could not rely solely upon the defendant's unwarned statements to the psychiatrists to find the defendant a sexually dangerous person. 463 N.E.2d at 137 (citation omitted).

CONCLUSION

There are compelling reasons to allow the writ in this case. The Illinois Supreme Court's holding that defendants charged to be sexually dangerous must undergo custodial psychiatric examinations and answer all incriminating questions about the charged and past crimes is unjust. The holding offends the purpose of the Fifth Amendment privilege against self-incrimination since it allows the defendant's compelled admissions to be used to prove a defendant is sexually dangerous, resulting in his confinement in the Department of Corrections for an indefinite period of time, i.e., until he can prove that he is no longer sexually dangerous. The court's holding will encourage Illinois prosecutors to initiate sexually dangerous persons proceedings where the State's criminal case is weak and/or where the defendant has no prior record of sexual offenses. By initiating such a charge, the prosecution can compel a defendant to make incriminating statements. This wholly inquisitorial procedure merits this Court's review.

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No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

CERTIFICATE OF SERVICE

I, Peter A. Carusona, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) I have served one copy of the Reply Brief on counsel for Respondent, by depositing same in a United States Post Office mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelope addressed as follows:

Ms. Sally L. Dilgart
Assistant Attorney General
State of Illinois Center
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601.

(2) The above-named party is the only party required to be served.

(3) I further state to the best of my knowledge that the Court's copies of these documents were enclosed in an envelope, properly addressed to the Clerk of this Court, and that said envelope was deposited in a United States mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, on the 10th day of October, 1985, which is within the permitted time of filing.

PETER A. CARUSONA

SUBSCRIBED AND SWORN TO
Before me this 10th day
of October, 1985.

Notary Public